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August 13, 1997

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Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W.
Room 222
Washington, D.C. 20554

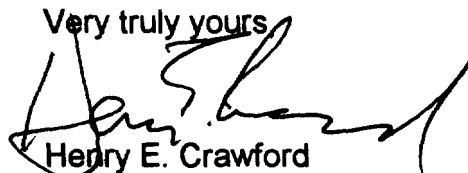
Re: In the Matter of
Amendment of Section 73.202(b)
Table of Allotments,
FM Broadcast Stations.
(Llano and Marble Falls, Texas)
MM Docket No. 95-49; RM-8558

Dear Mr. Caton:

Transmitted herewith on behalf of Roy E. Henderson and Tichenor License Corporation are an original and four (4) copies of a "Joint Reply to Opposition to Petition for Reconsideration" as directed to the Chief, Allocations Branch.

Should any additional information be required, please contact this office.

Very truly yours,


Henry E. Crawford
Counsel for
Roy E. Henderson

cc: The Chief, Allocations Branch

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BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C.

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MM Docket No. 95-49
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To: The Chief, Allocations Branch

**JOINT REPLY TO OPPOSITION TO PETITION FOR
RECONSIDERATION**

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August 13, 1997

TABLE OF CONTENTS

I.	INTRODUCTION	1
II.	ARGUMENT	3
A.	The Joint Counterproposal Was Not Late Filed	3
B.	The Joint Counterproposal Does Not Involve An "A/B/C Daisy Chain"	4
C.	The Joint Counterproposal Is Not Contingent.....	5
D.	There Is No "Cut And Shoot" Problem	6
E.	The Joint Counterproposal Contained A Firm Commitment To Apply For Channel 242C2 at Menard As A New Allotment.....	6
III.	CONCLUSION.....	7

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To: The Chief, Allocations Branch

**JOINT REPLY TO OPPOSITION TO PETITION FOR
RECONSIDERATION**

Roy E. Henderson ("Henderson") and Tichenor License Corporation ("Tichenor") (collectively "Joint Petitioners"), by counsel, pursuant to 47 CFR §1.429(g) respectfully submit their *Joint Reply to Opposition to Petition for Reconsideration*, in response to the Opposition to Joint Petition for Reconsideration ("Opposition") filed by Maxagrid Broadcasting Corporation ("Maxagrid") on July 13, 1997. In support thereof, the following is stated:

I. INTRODUCTION

1. **The Joint Counterproposal.** On August 2, 1996, the Commission released its Further Notice of Proposed Rulemaking, 11 FCC Rcd 12647 (1996) ("Further NPRM"). The Further NPRM sought comments and counterproposals that would be mutually exclusive with Channel 242A at Llano, Texas. In response, the Joint Petitioners filed a Joint Counterproposal that was, in fact, mutually exclusive with the proposed assignment of Channel 242A at Llano, Texas. The Joint Counterproposal sought the allotment of FM Channel 285C3 to Missouri City, Texas, the deletion of the presently assigned FM Channel 285A at

Rosenberg, Texas, the deletion of FM Channel 285A at Galveston and the reassignment of that channel to Menard, Texas, on FM Channel 242C2.

2. The Joint Counterproposal, taken as a whole, including the assignment to Menard, is mutually exclusive with the Channel 242A assignment at Llano, Texas, proposed in the Further NPRM. Therefore, it is both timely and technically sound from the standpoint of the allotment rules.

3. Maxagrid is in agreement regarding several of the key issues. It agrees that the Joint Counterproposal could not have been filed earlier in the proceeding:

...Channel 285C3 at Missouri City would *not* have been a Counterproposal to the NPRM proper.

Opposition, p. 4, ¶8 (emphasis in original). Maxagrid further accepts the fact that:

Channel 242C2 at Menard would be mutually exclusive with the replacement channel allotted to Llano, Channel 242A.

Opposition, pp. 5-6, ¶11 (emphasis supplied). Thus, Maxagrid accepts the underlying mutual exclusivity of the Joint Counterproposal as well as the fact that the Joint Counterproposal could not have been filed earlier.

4. Maxagrid, nevertheless, argues in the Opposition that:

- a) the Joint Counterproposal is untimely, despite the undisputed fact that it could not have been filed at any earlier point in the proceeding (Opposition, p. 5, ¶10);
- b) the Joint Counterproposal is somehow part of an "A/B/C daisy chain" involving a proposal for Katy, Texas that was properly and timely withdrawn (Opposition, p. 5, ¶9);

- c) one part of the Joint Counterproposal (the assignment of Channel 285C3 to Missouri City) is somehow improperly "contingent" upon what is simply just another part of the Joint Counterproposal (deletion of Channel 285A at Galveston) (Opposition, p. 6, ¶13);
- d) a "Cut and Shoot" problem exists even though there is no outstanding construction permit at issue here and, hence, no possible discrepancy between licensed facilities and facilities contained in an outstanding construction permit (Opposition, pp. 7-8, ¶14).

5. As will now be demonstrated, these arguments provide no sound reason for denying reconsideration of the Report & Order.

II. ARGUMENT

A. The Joint Counterproposal Was Not Late Filed

6. The parties agree that lacking mutual exclusivity, the Joint Counterproposal could not have been filed as a "Counterproposal to the NPRM proper." Opposition, p. 4, ¶8. However, since it could not have been filed at an earlier time in the proceeding, there is no rational way that it could be "late". Instead, the Joint Counterproposal is mutually exclusive with, and properly filed in response to the allotment to Llano, Texas proposed in the Further NPRM.

7. As already seen, Maxagrid accepts the fact that Channel 242C2 at Menard, Texas is mutually exclusive with Channel 242A at Llano, Texas. Opposition, p. 6, ¶11. However, Maxagrid further argues that Channel 285C3 at Missouri City must be mutually exclusive. Id. But that would require that every allotment in a multi-allotment counterproposal such as the instant Joint Counterproposal must be mutually exclusive with the proposed assignment. No such rule is offered by Maxagrid in the Opposition.

8. The Commission has defined the term counterproposal as:

...a proposal for an alternative and mutually exclusive allotment or set of allotments in the context of the proceeding in which the proposal is made.

Copeland, Kansas, 11 FCC Rcd 497, n. 2 (MMB 1996) (emphasis supplied).

From this definition it is clear that a valid counterproposal may consist of a mutually exclusive set of allotments, as is the case with the present Joint Counterproposal. It is the set of allotments making up the counterproposal that must be mutually exclusive, not every component. See, e.g., Cloverdale, Montgomery and Warrior, Alabama, 10 FCC Rcd 13630 (MMB 1995).

9. Taken as a whole, the Joint Counterproposal is mutually exclusive with the proposed assignment at Llano, Texas by virtue of the necessary reassignment of KLTP to Menard, Texas on Channel 242C2. Given the mutual exclusivity of the Joint Counterproposal, it was properly filed at the time for filing counterproposals in response to the Llano, Texas assignment. Therefore, the Joint Counterproposal was not late and should not have been dismissed.

B. The Joint Counterproposal Does Not Involve An "A/B/C Daisy Chain"

10. Maxagrid argues that the Missouri City part of the Joint Counterproposal is "...mutually exclusive with Mr. Henderson's Initial Counterproposal, Channel 285A at Katy and Smithville." Opposition, pp. 4-5, ¶¶8-9. However, Mr. Henderson simultaneously withdrew his initial proposal at the time of the filing of the Joint Counterproposal. As noted by the Commission in the Report & Order, the withdrawal was entirely proper and within the parameters of Section 1.420(j) of the Commission's Rules.

11. For all its citations, Maxagrid offers no case precedent for its implied assertion that a party is not free to withdraw a prior counterproposal, or that a present counterproposal can be mutually exclusive with a withdrawn counterproposal. Yet, that is what Maxagrid is claiming when it says that "Marble Falls/Katy/Missouri City" creates an "A/B/C" daisy chain.

12. As demonstrated in the attached Engineering Statement, the Joint Counterproposal is not a daisy chain of any sort. There, it is pointed out that Maxagrid's principal case, Kittyhawk Broadcasting Corp., 7 FCC 2d 153 (1967) involved AM applications and cut-off dates. It had virtually nothing to do with amending the FM table of allotments. Maxagrid is wrong in claiming that the Joint Counterproposal is a daisy chain.

C. The Joint Counterproposal Is Not Contingent

13. Contrary to Maxagrid's analysis (Opposition, p. 6, ¶13), the Joint Counterproposal is not "contingent" in any way. Maxagrid is correct in asserting that KLTP at Galveston stands in the way of the proposed assignment of Channel 285C3 at Missouri City. However, the Joint Counterproposal specifically sought the deletion of Channel 285A at Galveston and the reassignment of that channel to Menard, Texas on Channel 242C2. Far from being a "contingency" the reassignment is part of the Joint Counterproposal itself. Thus, all of the scenarios concocted by Maxagrid in which licenses would be surrendered and all manner of chaos would break out - are hogwash.

14. Maxagrid is quick to remind us that the accommodation of Channel 285C3 at Missouri City "...can only happen through rule making." Opposition, p.

6, ¶13. However, it was in a rulemaking that the Joint Counterproposal was filed. This rulemaking.

D. There Is No "Cut And Shoot" Problem

15. Nothing in the Joint Counterproposal implicates a "Cut and Shoot" problem. Cut and Shoot, Texas, 11 FCC Rcd 9501 (MMB 1996) involved an allotment request that was based on facilities specified in a construction permit, rather than the actual licensed facilities. No similar situation exists here. As noted in the attached Engineering Statement, the Joint Counterproposal advanced in the present case proposes that the licensed site, the city of license and channel all be changed in a way that honors the Commission's technical rules. Thus, there are no "contingencies" and no "Cut and Shoot" problem.

E. The Joint Counterproposal Contained A Firm Commitment To Apply For Channel 242C2 at Menard As A New Allotment

16. In the Joint Counterproposal, the Joint Petitioners each expressed an unqualified commitment to go forward with all aspects of the counterproposal. In particular, Tichenor promised to take all necessary actions to build and operate the station in Menard as requested. To the extent that any aspect of the commitment was unclear, in the Petition for Reconsideration Tichenor reaffirmed its commitment to apply for the channel in a filing window open to competing applications.

17. Maxagrid does not take on the interpretation of the language offered by the Joint Petitioners in the Petition for Reconsideration. Nor does Maxagrid challenge the reaffirmation of the commitment. Instead, Maxagrid

claims that this aspect of the Joint Counterproposal was a "contingency" that rendered the counterproposal "fatally defective." Opposition, p. 8, ¶16.

18. Given the language contained in the Joint Counterproposal, the Commission apparently misunderstood Tichenor as not being committed to opening up the Menard allocation to competing applicants. However, as demonstrated in the Petition for Reconsideration, Tichenor was at all times committed to taking all necessary steps in support of the Joint Counterproposal, including applying for Menard in an open filing window. Nothing contained in the Maxagrid Opposition is contrary to that commitment. Consequently, the Commission should honor that commitment.

III. CONCLUSION

19. The Joint Counterproposal is not a "daisy chain". It does not present a "Cut and Shoot" problem. Nor does it depend on "contingencies" outside of the Joint Counterproposal. It is a properly filed counterproposal, mutually exclusive with the assignment proposed in the Further NPRM. Consequently, the Commission erred in dismissing the Joint Counterproposal.

WHEREFORE, Roy E. Henderson and Ticchenor License Corporation respectfully request that the Commission reverse the Report & Order and reinstate the Joint counterproposal.


August 13, 1997

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Respectfully Submitted,

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Engineering Statement
Reply to
OPPOSITION TO PETITION FOR RECONSIDERATION
MM Docket 95-49
Llano and Marble Falls, Texas
August 1997

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STATE OF ILLINOIS)
)
COUNTY OF PEORIA) SS:

F. W. Hannel, after being duly sworn upon oath,
deposes and states:

He is a registered Professional Engineer, by
examination, in the State of Illinois;

He is a graduate Electrical Engineer, holding Bachelor
of Science and Master of Science degrees, both in Electrical
Engineering;

His qualifications are a matter of public record and
have been accepted in prior filings and appearances requiring
scrutiny of his professional qualifications;

The attached Engineering Report was prepared by him
personally or under his supervision and direction and;

The facts stated herein are true, correct, and
complete to the best of his knowledge and belief.

August 11, 1997



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Engineering Statement
Reply to
OPPOSITION TO PETITION FOR RECONSIDERATION
MM Docket 95-49
Llano and Marble Falls, Texas
August 1997

This firm has been retained by Roy E. Henderson, licensee of Radio Station KLTO(FM), Rosenberg, Texas, to prepare this engineering statement in support of his Reply Comments in the above captioned proceeding. On September 23, 1996, Henderson, along with the licensee of Radio Station KLTP(FM), filed a counterproposal in this proceeding seeking the allotment of FM Channel 285C3 to Missouri City, Texas, and the deletion of the presently assigned FM Channel 285A at Rosenberg, the deletion of FM Channel 285A at Galveston and the reassignment of that channel to Menard, Texas, on FM Channel 242C2. The allotment of FM Channel 242C2 at Menard, Texas, was in conflict with the Commissions Further Notice of Proposed Rulemaking which proposed the assignment of FM Channel 242A to Llano, Texas, as a replacement channel for FM Channel 284C3 at Llano, Texas.

On May 30, 1997, the Commission issued a Report and Order in this proceeding dismissing the proposal to allot FM Channel 285C3 to Missouri City, Texas, and the allotment of FM Channel 242C2 to Menard, Texas, to which Henderson filed a Petition For Reconsideration, requesting that the Commission consider the properly filed Counterproposal.

In its Opposition to the Joint Petition For Reconsideration, Maxagrid Broadcasting Corporation opposed the Petition For Reconsideration filed by Henderson, claiming that the Henderson proposal was fatally flawed and was unacceptable for filing under the Commission's Rules citing a 1967 case, *Kittyhawk Broadcasting Corp*, 7 FCC 2d 153, claiming the Henderson proposal was the classic A/B/C "daisy chain" that the Commission has seen time and time again. The *Kittyhawk*

case involved cutoff dates applied to an AM case in 1967 where one of the parties filed an AM proposal after the B cutoff date assigned in the original proceeding. After that date, the filing party filed an application that was not in conflict with the original B cutoff proposal, but was in conflict with another proposal that was on file by the B date. The Commission refused to accept the later filed application due to its conflict with a prior filed application that was on file by the B cutoff date.

Initially it should be noted that the A/B/C daisy chain case was an AM case from 1967 not involving any FM allotments whatsoever, but rather involved AM applications and B cutoff dates. In the Henderson situation, the proposal is an FM Allotment request filed to request that the Commission amend the FM Table of Allotments. It does not involve signal overlap or a B cutoff date. In the *Kittyhawk* case, the A/B/C daisy chain developed because B filed an application on the B cutoff date that was in conflict with A. After the cutoff date C then filed an application in conflict with B but not in conflict with A. Therefore, A and C would have been tied together by both being in conflict with B. Since C was not on file by the B cutoff, the Commission found that C was not acceptable for filing. There is no such A/B/C link in the Henderson proposal.

The Henderson proposal is not in conflict with any proposal on file with the Commission at the time it was filed, as has been previously shown, with the lone exception of the proposed assignment of FM Channel 242A at Llano, Texas. Henderson has clearly shown that the assignment of FM Channel 242C2 at Menard, Texas, results in a higher-class channel assignment to another community that would receive a first aural service, and that is the only conflict that exists in this proceeding.

Finally, Maxagrid incorrectly states that the principles of *Cut and Shoot*, Texas, 11 FCC Rcd 9501(MMB 1996), foreclose the Commission from accepting the Henderson proposal. In *Cut and Shoot*, the Commission returned a Petition for Rulemaking, which was short, spaced to a licensed site but was fully spaced to a Construction Permit site, and in a footnote defined what it would consider as "Authorized Sites". In *Cut and Shoot*, the Commission pointed out that the eventual licensing at a CP site constituted a contingent rulemaking proposal and, as such, the

proposal was not acceptable. In the Henderson case, it is proposed that the licensed site, city of license and channel at Galveston, Texas, be changed so that all of the Commissions mileage separation rules are satisfied. There are no contingencies whatsoever in the proposal.

In summary, the Henderson proposal simply seeks to change FM Channel 285A from Rosenberg, Texas, to Missouri City, Texas, on FM Channel 285C3. This portion of the proposal is in conflict with the assignment of FM Channel 285A at Galveston, Texas. To remove this conflict, Henderson proposes, and the license of the Galveston facility has agreed, to request the assignment of 242C2 to Menard, Texas, and amendment of the Galveston license to specify operation on FM Channel 242C2 at Menard, Texas, in accordance with the Commissions Rules. The only conflict is between the proposed use of FM Channel 242A at Llano and FM Channel 242C2 at Menard, Texas. There are no "daisy chain" connections, nor are there any contingencies in the proposal.

CERTIFICATE OF SERVICE

I, Henry E. Crawford, do hereby certify that copies of the foregoing Joint Reply to Opposition to Petition for Reconsideration have been served by United States mail, postage prepaid this 13th day of August, 1997 upon the following:

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